September 13, 2005
Winnipeg, Manitoba

Forensic Evidence Review Committee #2

Final Report

Submitted to:
Mr. Ronald S. Perozzo, Q.C.
Deputy Attorney General
Manitoba Justice

Manitoba

Table of Contents

Background and Terms of Reference for the Committee.....Page 3

Committee Membership.....Page 5

Research Methodology.....Page 5

Findings and Recommendations.....Page 6

Background and Terms of Reference for the Committee

Background

On August 19, 2004 The Forensic Evidence Review Committee presented its final report on the review of all homicide cases from the previous fifteen (15) years in Manitoba in which hair comparison evidence was relied upon to secure a conviction. The committee was composed of six (6) members from the Manitoba Department Justice, the Defence Bar, Manitoba police and an independent scientific expert.
The goal of the committee was to actively seek out any possible miscarriages of justice that may have resulted from a reliance on hair comparison evidence.

Based on that report 2 cases were set aside for further review: *R v. Kyle Wayne Unger* and *R v. Robert Stewart Sanderson.* In each case experts testified that hair samples appeared consistent with known samples. DNA testing would later show that the hair samples did not come from the known source. As hair was not the only evidence in either trial the committee recommended that Kyle Unger's case be brought before the Manitoba Court of Appeal through the federal government's 696 process. The federal government now has conduct of the *R. v. Unger* file. *R. v. Sanderson* is being handled by counsel outside of Prosecutions, within the Constitutional Law Branch.

As a result of those findings the province renewed the committee's mandate on September 15, 2004 shifting its focus to examining sexual assault and robbery cases prosecuted in the past 15 years.

The following Terms of Reference for the Committee were established:

Terms of Reference

The Deputy Attorney General of Manitoba has established an advisory committee to examine certain sexual assault, robbery and other cases prosecuted in Manitoba where the Crown relied upon a particular type of forensic evidence. The review is similar to a recently completed review of certain homicide cases.

Composition of the Advisory Committee

The committee shall consist of a General Counsel from the Manitoba Prosecution Service as Chair; a senior Crown attorney; a lawyer in the private sector in Manitoba designated by the Association in Defence of the Wrongfully Convicted; a representative from each of the Royal Canadian Mounted Police and the Winnipeg Police Service; and a forensic expert unconnected with any law enforcement agency, designated by the Deputy Attorney General after consultation with the other members of the committee. Other persons with expertise may be consulted by the committee from time to time, through the Chair.

Objectives of the Advisory Committee

The committee shall consider whether there is a reasonable basis to believe that a miscarriage of justice has taken place in cases of sexual assault or robbery prosecuted in Manitoba during the past 15 years where:

- *the Crown tendered and relied upon microscopic hair comparison evidence;*
- *the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty; and*
- *the conviction was appealed to the Court of Appeal, still asserting factual innocence, and the appeal was dismissed.*

The committee will actively seek out such cases. It shall also invite defence attorneys to make submissions in relation to individuals convicted of other indictable offences if microscopic hair comparison evidence was relied upon and the case was appealed in the past 15 years, maintaining factual innocence throughout. The committee is also authorized to take any other steps it deems appropriate to identify cases of this nature.

Amongst other issues, the committee shall consider the following factors:

- *the nature of the microscopic hair evidence tendered in the context of the trial record;*
- *whether, with the benefit of current scientific expertise, the conclusions tendered by the Crown at trial respecting this evidence were incorrect or overstated;*
- *the extent to which the Crown relied upon this evidence to prove the case;*
- *any comments made by the trial judge concerning the probative value or weight to be given to this evidence; and*
- *any other factors respecting this evidence that may assist in assessing whether a miscarriage of justice has occurred.*

During the course of its work, the committee, through the Chair, may arrange for DNA or other scientific testing of the evidence to assist the committee during the review.

The committee shall provide a report on its findings and recommendations to the Deputy Attorney General by or before September 15, 2005.
Public communication concerning the work of the committee during the review, should that prove necessary, will be made through the Chair. Upon receipt of the report of the committee, the Deputy Attorney General will publicly announce the results of the committee's work.

Committee Membership

As of the time of the writing of this report, the following individuals were part of the Committee:

1. Mr. Richard A Saull
   Committee Chair
   General Counsel
   Manitoba Department of Justice

2. Mr. Ian Garber
   Representative of the Association in Defence of the Wrongfully Convicted(AIDWYC)
   Attorney-at-law, Winnipeg, Manitoba

3. Inspector David Thorne
   Duty Officer
   Winnipeg, Police Service

4. Inspector David Roper
   Officer-in-charge, Major Crimes Services
   'D' Division, Royal Canadian Mounted Police, Winnipeg, Manitoba

5. Professor Norm Davison
   Department of Physics and Astronomy
   University of Manitoba, Winnipeg

6. Mr. Don Slough
   Director of Special Prosecutions and Appeals
   Manitoba Department of Justice

Research Methodology

In order to properly determine the actual number of cases that fit the criteria listed in the terms of reference established for the Committee, Crown Attorney Elizabeth KJ Pats began an extensive search using Quicklaw, the Manitoba judgments database at the Court of Appeal level as well as lists of cases provided by the Winnipeg Police Service and the RCMP. By cross-referencing all of the cases on these lists, Ms Pats was able to capture 492 cases. Due to the sheer number of cases involved, Melissa Fenn, an articling student was added to the project. Through reading the decisions as documented on Quicklaw, Ms. Pats and Ms Fenn were able to eliminate 487 of the cases for various reasons such as:

- the appeal involved bail conditions or a sentence and not factual innocence;
- the appeal was allowed;
- the appeal related to a defence (e.g. consent, intoxication, self-defence) and therefore lacked the requirements of the terms of reference.
- factual innocence had been alleged but hair evidence was never tendered, or
- no factual innocence had ever been asserted by the accused.

For the five remaining cases the trial transcripts were ordered and upon further review they too were eliminated, as they did not fit the criteria.

During this culling process, a letter was sent from Assistant Deputy Attorney General, Rob Finlayson soliciting input from members of the Defence Bar respecting any cases that they were aware of that fit the above criteria (see: Appendix A for sample correspondence). No responses were received that fit the criteria as outlined in the Terms of Reference although Defence Counsel has sought a review of one murder conviction on other grounds. That case has been referred to outside counsel for review.

Findings and Recommendations

Given the above noted findings this Committee recommends no further action in respect of the cases identified.

That said, this Committee feels that a review process, similar to the one currently in place, is essential to maintain public confidence in the administration of justice. This in turn will require vigilance in keeping abreast of developments in Forensic Science.

Signed this 13th day of September, 2005 in Winnipeg, Manitoba.

Richard A. Saull, Chair
Forensic Review Committee

Ian Garber

Don Slough

Graham Pollock

David Thorne

Norm Davison